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Division in the Illinois Appellate Court: What is the Appropriate Standard of Review for Alleged Prosecutorial Misconduct During Closing Argument?

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Division in the Illinois Appellate Court: What is the Appropriate Standard of Review for Alleged Prosecutorial Misconduct During Closing Argument?

BY RYAN T. HARDING[1]

The Illinois Appellate Court is divided on whether to apply de novo review or an abuse of discretion standard when evaluating alleged prosecutorial misconduct during closing argument. This article concludes that de novo review is the proper standard of review under current Illinois law. However, as a matter of policy, this article recommends that (1) abuse of discretion review should normally apply to the trial court's determination that a defendant was not substantially prejudiced by the State's closing argument; (2) de novo review should apply when the trial court's determination that a defendant was not substantially prejudiced turned on a pure question of law; and (3) the plain error doctrine should apply when the defendant fails to preserve the issue of whether he was substantially prejudiced by the State's closing argument.

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I. INTRODUCTION

The Illinois Appellate Court is divided over the appropriate standard of review for evaluating alleged prosecutorial misconduct during closing argument.[2] Currently, the First and Third Divisions of the First District have applied an abuse of discretion standard while the Third and Fourth Districts and the Fifth Division of the First District have applied *de novo* review.[3] This article evaluates the origin and effect of this division and ultimately concludes that *de novo* is the proper standard of review under current Illinois law.

However, as a matter of policy, this article recommends that (1) abuse of discretion review should normally apply to the trial court's determination that a defendant was not substantially prejudiced by the State's closing argument; (2) *de novo* review should apply when the trial court's determination that a defendant was not substantially prejudiced turned on a pure question of law; and (3) the plain error doctrine should apply when the defendant fails to preserve the issue of whether he was substantially prejudiced by the State's closing argument. Adopting this three-pronged approach would clarify Illinois law while serving important policy goals.

II. BACKGROUND

This section begins by examining the structure of the Illinois judiciary. This section then reviews the law governing closing arguments and discusses when a prosecutor's closing argument is improper. This section will then discuss how courts review forfeited issues under the plain error doctrine. This

2. *See* People v. Green, 2017 IL App (1st) 152513, ¶ 78.
3. *Id.* at ¶ 80.

section will end by thoroughly examining the current division of authority in the Illinois Appellate Court regarding the appropriate standard of review when examining the propriety of the State's closing argument.

A. STRUCTURE OF THE ILLINOIS JUDICIARY

The Illinois judiciary is comprised of a circuit court, appellate court, and supreme court.[4] The circuit court, known informally as the trial court, is a court of general jurisdiction and hears a wide variety of civil and criminal cases.[5] The Illinois Appellate Court is a court of intermediate review.[6] This court is divided into five districts.[7] Cook County comprises the entire First District and is divided into six divisions.[8] The Chicago suburbs and northwest Illinois are in the Second District, and downstate Illinois is within the Third, Fourth, and Fifth District.[9] The Illinois Supreme Court is the highest court in the State of Illinois.[10]

B. IMPROPER CLOSING ARGUMENTS

Closing arguments allow the State and the defense a final opportunity to review with the jury the admitted evidence, discuss what the evidence means, apply the law to that evidence, and argue why the evidence and the law compel a favorable verdict.[11] Generally, prosecutors are given wide latitude during closing argument.[12] The prosecutor has the right to comment on the evidence and all reasonable inferences from the evidence, even if this is unfavorable to the defendant.[13] The prosecutor may also respond to comments invited by the defense.[14] However, closing argument must serve a purpose beyond inflaming the emotions or prejudices of the jury.[15] Likewise, it

4. ILL. CONST. art. VI, § 1.
5. ILL. CONST. art. VI, § 9.
6. *See* ILL. CONST. art. VI, §§ 5-6.
7. *Illinois Appellate Court General Information*, ILL. COURTS (2018), http://illinoiscourts.gov/AppellateCourt/AppGenInfoDefault.asp [https://perma.cc/FXE9-KESY]; *see* People v. Layhew, 564 N.E.2d 1232, 1238-39, 139 Ill. 2d 476, 489 (Ill. 1990) ("[T]here is but one appellate court within the State of Illinois [notwithstanding the court being divided into different districts].").
8. *See Map of Illinois Judicial Districts*, ILL. COURTS (2018), http://illinoiscourts.gov/AppellateCourt/DistrictMap.asp [https://perma.cc/3434-YFQK].
9. *See id.*
10. *See generally* ILL. CONST. art. VI, § 1.
11. People v. Nicholas, 842 N.E.2d 674, 685 (Ill. 2005).
12. People v. Hampton, 899 N.E.2d 532, 544 (Ill. App. Ct. 1st 2008).
13. *Id.*
14. People v. Willis, 997 N.E.2d 947, 970 (Ill. App. Ct. 1st 2013).
15. People v. Wheeler, 871 N.E.2d 728, 748 (Ill. 2007).

is improper for the prosecutor to misstate the evidence, misstate the law, or argue facts not in evidence.[16]

Improper comments during closing argument are reversible error only when they cause substantial prejudice to the defendant.[17] Substantial prejudice occurs when the improper statements were a material factor in the defendant's conviction.[18] Improper statements are a material factor if (1) the jury could have reached a contrary verdict had the improper comments not been made or (2) the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction.[19] The strength of the evidence against the defendant is often a decisive factor when determining whether the improper statements were a material factor.[20] For example, in *People v. Alvidez*, the prosecutor's improper statement was not a material factor in defendant's conviction because the improper comment was on a collateral matter and "the medical evidence proffered by the State was more than compelling evidence of defendant's guilt."[21]

Whether a prosecutor's closing argument caused substantial prejudice is evaluated according to the language used, its relation to the evidence, and the effect of the argument on the defendant's right to a fair and impartial trial.[22] Closing arguments must be viewed in their entirety, and the complained of comments must be viewed in the proper context.[23] Generally, the trial court cures any prejudice arising from closing argument by instructing the jury that closing arguments are not evidence and to disregard any argument not based on the evidence.[24] Likewise, a prosecutor's misstatement of the law during closing argument does not normally constitute reversible error if the trial court properly instructs the jury on the law.[25]

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16. People v. Smith, 565 N.E.2d 900, 908 (Ill. 1990); People v. Chavez, 762 N.E.2d 553, 563 (Ill. App. Ct. 1st 2001).

17. People v. Thompson, 997 N.E.2d 681, 696 (Ill. App. Ct. 1st 2013).

18. People v. Harris, 74 N.E.3d 1, 13-14 (Ill. App. Ct. 1st 2017).

19. *Wheeler*, 871 N.E.2d at 745.

20. *See Harris*, 74 N.E.3d at 14 (stating that improper statements were not a material factor "in light of the ample, if not overwhelming, additional evidence that supported a finding of the defendant's guilt"); *see also Wheeler*, 871 N.E.2d at 749 ("We believe that in a case like this, relying heavily on the credibility of the testifying police witnesses, the prosecutor's utilization of closing arguments to inflame the passions and prejudices of the jury constituted a material factor in defendant's conviction."); *see also* People v. Johnson, 803 N.E.2d 405, 441-42 (Ill. 2003) ("We note that the evidence in this case was not closely balanced. The jury had before it [defendant's] confession, physical evidence[,] . . . and the uncontradicted testimony of an eyewitness to the shooting. . . . In sum, the prosecutor's comments, quite simply, did not result in substantial prejudice to [defendant] under these circumstances[.]").

21. People v. Alvidrez, 21 N.E.3d 720, 729-30 (Ill. App. Ct. 1st 2014).

22. *Hampton*, 899 N.E.2d at 544-45.

23. *Id.* at 546-47.

24. *Wheeler*, 871 N.E.2d at 748.

25. People v. Jackson, 974 N.E.2d 855, 870 (Ill. App. Ct. 1st 2012).

C. PRESERVED VS. UNPRESERVED ERRORS

To preserve a claim of prosecutorial misconduct for review, a defendant must object to the offending statements both at trial and in a written post-trial motion.[26] At the post-trial hearing, the trial court determines if the comments caused substantial prejudice to the defendant.[27]

If a defendant fails to preserve his claim, the purported error is forfeited.[28] However, the plain error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider an unpreserved error when (1) the evidence is close, regardless of the seriousness of the error or (2) the error is serious, regardless of the closeness of the evidence.[29]

Under the plain error doctrine, the defendant must first show that a clear or obvious error occurred.[30] Next, the defendant must satisfy either the first or second prong of the plain error doctrine.[31] Under the first prong, the defendant must prove that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him.[32] Under the second prong, the defendant must prove that the error was so serious that it affected the fundamental fairness of his trial and challenged the integrity of the judicial process.[33] The defendant bears the burden of persuasion at all times.[34]

D. DIVISION IN THE ILLINOIS APPELLATE COURT

The Illinois Appellate Court is currently divided over the appropriate standard of review when reviewing the propriety of the State's closing argument.[35] For example, the First and Third Divisions of the First District have applied an abuse of discretion standard while the Third and Fourth Districts and the Fifth Division of the First District have applied *de novo* review.[36] The Second District and various divisions of the First District have recognized this split of authority but have failed to settle the issue.[37] This subsection will evaluate the origin of this division and will then discuss the current division of authority within the Illinois Appellate Court.

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26. *Id.* at 868.
27. *See* People v. Love, 878 N.E.2d 789, 795 (Ill. App. Ct. 1st 2007).
28. People v. Sebby, 89 N.E.3d 675, 687 (Ill. 2017).
29. People v. Herron, 830 N.E.2d 467, 479-80 (Ill. 2005).
30. People v. Hillier, 931 N.E.2d 1184, 1187 (Ill. 2010).
31. *See id.*
32. People v. Thompson, 939 N.E.2d 403, 413 (Ill. 2010).
33. *Id.* at 413-14.
34. *Id.*
35. *Green*, 2017 IL App (1st) 152513, at ¶ 78.
36. *Id.* at ¶ 80.
37. *See id.*

i. Origin of the Division

This division began with apparent confusion over two Illinois Supreme Court cases: *People v. Wheeler* and *People v. Blue*.[38] In *Blue*, the defendant argued that prosecutors made improper statements during closing argument when they said that the jury needed to "send a message" to the victim's family.[39] The Illinois Supreme Court first noted that the defendant failed to properly preserve this issue because, although he objected at trial, he failed to file a post-trial motion.[40] Nonetheless, in reviewing the propriety of these statements, the *Blue* Court applied an abuse of discretion standard, noting that the "regulation of the substance and style of the closing argument is within the trial court's discretion, and the trial court's determination of the propriety of these remarks will not be disturbed absent a clear abuse of discretion."[41]

In *Wheeler*, the prosecutor made improper statements during closing argument.[42] The defendant objected to many of the improper statements, and the trial court overruled some of those objections.[43] The Illinois Supreme Court held that the defendant preserved the issue for appeal.[44] When reviewing the propriety of statements, the Court noted "[w]hether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*."[45]

Nonetheless, the *Wheeler* Court did not explicitly overrule or distinguish *Blue*, which held that the propriety of closing statements are subject to an abuse of discretion standard.[46] Adding further complexity, the *Wheeler* Court cited approvingly to *Blue* for areas of law other than the standard of review.[47]

ii. Division in the Illinois Appellate Court

Following the decision in *Wheeler*, a split of authority occurred within the Illinois Appellate Court. In *People v. Love*, the defendant argued that a

38. *Id.* at ¶ 79.
39. People v. *Blue*, 724 N.E.2d 920, 934 (Ill. 2000).
40. *Id.*
41. *Id.* at 935 (citing People v. Byron, 647 N.E.2d 946, 954 (Ill. 1995)).
42. *Wheeler*, 871 N.E.2d at 748-49.
43. *Id.*
44. *Id.* at 745 (noting that defendant properly preserved some of the improper closing arguments and that the court would then consider the entirety of the prosecutor's closing statement).
45. *Id.* at 744 (citing People v. Graham, 795 N.E.2d 231, 237 (Ill. 2003)).
46. *See Wheeler*, 871 N.E.2d at 744.
47. *See id.* at 744, 749.

prosecutor tried to mislead the jury during closing argument.[48] The Illinois Appellate Court, First District, First Division concluded that the defendant had properly preserved this claim and applied an abuse of discretion standard when reviewing the trial court's determination.[49] The court ultimately concluded that the prosecutor's comments were not improper and affirmed the conviction.[50]

In *People v. McCoy*, the defendant argued that the prosecutor made improper statements during closing argument.[51] The Illinois Appellate Court, Third District found that the defendant had failed to properly preserve this issue.[52] Nonetheless, the court evaluated the purported error under the plain error doctrine.[53] Applying *de novo* review, the court found that the prosecutor misstated the law during closing argument.[54] Because the evidence was closely balanced in this case and because the statement was a clear error, the court reversed defendant's conviction and remanded the case for a new trial.[55]

In *People v. Averett*, the defendant objected to the State's closing argument at trial.[56] The trial court overruled the objection.[57] However, the defendant failed to properly preserve the issue because he failed to file a post-trial motion.[58] The Illinois Appellate Court, First District, Third Division applied the plain error doctrine to review this unpreserved issue.[59] The court then applied an abuse of discretion standard to review the trial court's decision.[60] The court ultimately concluded that the statements were not improper and that, even if they were improper, they did not rise to the level of a clear error.[61] The court therefore affirmed the conviction.[62]

In *People v. Palmer*, the defendant did not object to the State's closing argument.[63] Defendant appealed his conviction, arguing that the State's closing argument was improper.[64] The Illinois Appellate Court, Fourth District reviewed the purported error under the plain error doctrine.[65] The court

48. *Love*, 878 N.E.2d at 795.
49. *Id.* at 796.
50. *Id.* at 797.
51. People v. McCoy, 881 N.E.2d 621, 631-32 (Ill. App. Ct. 3d 2008).
52. *Id.* at 631.
53. *Id.* at 633.
54. *Id.*
55. *Id.*
56. People v. Averett, 886 N.E.2d 1123, 1128-30 (Ill. App. Ct. 1st 2008).
57. *Id.*
58. *Id.* at 1129.
59. *Id.*
60. *Id.* at 1129-30 (citing *Love*, 878 N.E.2d at 796).
61. *Averett*, 886 N.E.2d at 1128-30.
62. *Id.* at 1129 (citing *Love*, 878 N.E.2d at 796).
63. People v. Palmer, 889 N.E.2d 244, 252 (Ill. App. Ct. 4th 2008).
64. *See id.*
65. *Id.*

applied *de novo* review when evaluating the propriety of the prosecutor's statements and ultimately concluded that no error occurred.[66]

In *People v. Ramos*, the defendant argued that the prosecutor made improper statements during closing argument.[67] However, because he did not object to this purported error at trial, the Illinois Appellate Court, First District, Fifth Division reviewed the argument under the plain error doctrine.[68] The court used *de novo* review to examine the propriety of the prosecutor's statements, ultimately concluding that the prosecutor's statements were proper.[69]

iii. Recognizing, But Not Resolving, the Division

In *People v. Johnson*, the defendant argued that a prosecutor's remarks during closing argument constituted reversible error.[70] However, defendant failed to preserve the issue for appeal because he failed to object to the statements at trial.[71] The Illinois Appellate Court, First District, First Division recognized that "[i]t is not clear whether the appropriate standard of review for this issue is de novo or abuse of discretion."[72] The court so reasoned because:

> Last year, our supreme court held: "Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*." *Wheeler*, 226 Ill.2d at 121, 313 Ill.Dec. 1, 871 N.E.2d 728. However, the supreme court in *Wheeler* cited with approval *People v. Blue,* 189 Ill.2d 99, 244 Ill.Dec. 32, 724 N.E.2d 920 (2000), in which the supreme court had previously applied an abuse of discretion standard. [citation omitted]. In Blue and numerous other cases, our supreme court had held that the substance and style of closing argument is within the trial court's discretion, and will not be reversed absent an abuse of discretion. [citations omitted]. Our supreme court had reasoned: "Because the trial court is in a better position than a reviewing court to determine the prejudicial effect of any remarks, the scope of closing argument is within the trial court's discretion." [citation omitted].

66. *Palmer*, 889 N.E.2d at 252-53 (citing *Wheeler*, 871 N.E.2d at 744).
67. People v. Ramos, 920 N.E.2d 504, 507 (Ill. App. Ct. 1st 2009).
68. *Id.*
69. *Id.* at 510.
70. People v. Johnson, 898 N.E.2d 658, 675 (Ill. App. Ct. 1st 2008).
71. *Id.* at 676-77.
72. *Id.* at 675.

> Following Blue and other supreme court cases like it, this court had consistently applied an abuse of discretion standard. [citations omitted]. Since *Wheeler,* appellate courts have been divided regarding the appropriate standard of review. The First District has applied an abuse of discretion standard, while the Third and Fourth Districts have applied a de novo standard of review. [citations omitted].[73]

However, despite thoroughly identifying and describing the division, the court declined to answer which standard of review should apply.[74] The court so ruled because "we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this case would be the same under either standard."[75]

The Fourth and Sixth Divisions of the First District and the Second District have also recognized the division of authority within the Illinois Appellate Court. However, these courts declined to decide which standard of review should apply.[76] Rather, under similar fact patterns where the defendant had failed to properly preserve the issue for appeal, these courts decided that they "do not need to resolve the issue of the appropriate standard of review . . . because our holding . . . would be the same under either standard."[77]

III. ANALYSIS

This section begins by evaluating the importance of this issue. Next, this section evaluates the Illinois Supreme Court's analysis in *Wheeler*. This section concludes that the *Wheeler* Court erred when it established *de novo* as the standard of review for evaluating alleged prosecutorial misconduct during closing argument. The *Wheeler* Court erred because the Court undermined established precedent without explicitly overruling or distinguishing existing case law that previously held that abuse of discretion was the proper standard of review. This section also concludes that the Illinois Appellate Court erred in various cases when it subsequently applied an abuse of

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73. *Id.*

74. *Id.*

75. *Johnson*, 898 N.E.2d at 675.

76. People v. Anaya, 2017 IL App (1st) 150074, ¶ 46 ("Since *Wheeler*, appellate courts have been divided regarding the appropriate standard of review."); People v. Burman, 986 N.E.2d 1249, 1254 (Ill. App. Ct. 2d 2013); People v. Land, 955 N.E.2d 538, 562 (Ill. App. Ct. 1st 2011) ("It is not clear whether the appropriate standard of review for this issue is *de novo* or abuse of discretion.").

77. *Land*, 955 N.E.2d at 563; *see* People v. Robinson, 909 N.E.2d 232, 250 (Ill. App. Ct. 2d 2009); *see also Anaya*, 2017 IL App (1st) 150074, ¶ 46 ("[W]e do not need to resolve the issue of the appropriate standard of review at this time because our holding in this case would be the same under either standard.").

discretion standard. The Illinois Appellate Court erred because *Wheeler*, despite its faults, is still binding precedent.

This section will then begin a policy-based evaluation of what standard of review would be the most desirable when evaluating the propriety of the State's closing argument. This section concludes that (1) abuse of discretion review should normally apply to the trial court's determination that a defendant was not substantially prejudiced by the State's closing argument; (2) *de novo* review should apply when the trial court's determination turned on a pure question of law; and (3) the plain error doctrine should apply when the defendant fails to preserve the issue of whether he was substantially prejudiced by the State's closing argument.

A. IMPORTANCE OF THIS ISSUE

Currently, the Illinois Appellate Court is still divided over the appropriate standard of review. This matter is of unique importance to defendants because the outcome of their appeal will often turn on which standard of review is applied.[78] When an appellate court reviews an issue *de novo*, it need not defer to the trial court's judgment or reasoning.[79] Rather, *de novo* review is independent of the trial court's decision.[80] *De novo* review is the least deferential standard of review.[81] Abuse of discretion, by contrast, is the most deferential standard of review.[82] The reviewing court does not consider whether it would have made the same decision as the trial court and will only reverse the trial court's decision if (1) no reasonable person would take the view adopted by the trial court or (2) the court's ruling was arbitrary, fanciful, or otherwise unreasonable.[83]

This matter is also of unique importance to the judiciary. First, a split of authority within the Illinois Appellate Court is particularly distressing because the law could be applied differently based solely upon geography.[84]

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78. Timothy J. Storm, *The Standard of Review Does Matter: Evidence of Judicial Self-Restrain in the Illinois Appellate Court*, 34 S. Ill. U. L. J. 73, 103 (2009).

79. People v. Vincent, 871 N.E.2d 17, 26 (Ill. 2007).

80. Nationwide Advantage Mortg. Co. v. Ortiz, 975 N.E.2d 178, 183 (Ill. App. Ct. 1st 2012).

81. U.S. Steel Corp. v. Ill. Pollution Control Bd., 892 N.E.2d 606, 610 (Ill. App. Ct. 5th 2008).

82. *Id.*

83. People v. Rivera, 986 N.E.2d 634, 646 (Ill. 2013); *Ill. Pollution Control Bd.*, 892 N.E.2d at 610; 3 ROBERT J. STEIGMANN & LORI NICHOLSON, ILLINOIS EVIDENCE MANUAL § 20:21 (4th ed. 2006) ("[A] court abuses its discretion only when it acts arbitrarily without the employment of conscious judgment or, in view of all the circumstances, exceeds the bounds of reason and ignores recognized principles of law, so that no reasonable person would take the view adopted by it.").

84. *See generally Map of Illinois Judicial Districts*, ILL. COURTS (2018), http://illinoiscourts.gov/AppellateCourt/DistrictMap.asp [https://perma.cc/2JVD-95FM].

For example, under the current split of authority, a defendant in the First District who loses an objection to the State's closing argument could have his case decided under the abuse of discretion standard while a similarly situated defendant in the Third District would have his case decided under *de novo* review.[85] The Illinois judiciary should strive for uniformity of law throughout the entire state. Second, as stated earlier, a defendant's appeal will often turn on the standard of review that is applied.[86] The judiciary must be concerned about the fundamental fairness of a defendant losing his appeal in the First District because the appellate court applied an abuse of discretion standard but a similarly situated defendant in the Third District wins his appeal because the appellate court applied *de novo* review.[87]

B. THE ILLINOIS SUPREME COURT ERRED IN *WHEELER*

In *Wheeler*, the Illinois Supreme Court erroneously undermined established precedent. Prior to *Wheeler*, the Illinois Supreme Court and the Illinois Appellate Court consistently applied an abuse of discretion standard when reviewing the State's closing argument.[88] For example, in *People v. Smothers*, the Illinois Supreme Court reasoned as follows:

> The general atmosphere of the trial is observed by the trial court, and cannot be reproduced in the record on appeal. The trial court is, therefore, in a better position than a reviewing court to determine the prejudicial effect, if any, of a remark made during [closing] argument, and unless [that decision is] clearly an abuse of discretion, its ruling should be upheld.[89]

Likewise, in *People v. Hudson*, the Illinois Supreme Court concluded that "[b]ecause the trial court is in a better position than a reviewing court to determine the prejudicial effect of any remarks, the scope of closing

85. *Compare Love*, 878 N.E.2d at 789 (Ill. App. Ct. 1st 2007) *with McCoy*, 881 N.E.2d at 633 (Ill. App. Ct. 3d 2008).

86. *See* Storm, *supra* note 78, at 103.

87. *See generally* Julian W. Smith, Note, *Evidence of Ambiguity: The Effect of Circuit Splits on the Interpretation of Federal Criminal Law*, 16 SUFFOLK J. TRIAL & APP. ADVOC. 79, 87-88 (2011).

88. *S*ee, *e.g.*, People v. Caffey, 792 N.E.2d 1163, 1210 (Ill. 2001); People v. Williams, 736 N.E.2d 1001, 1020 (Ill. 2000); People v. Emerson, 727 N.E.2d 302, 331 (Ill. 2000); People v. Armstrong, 700 N.E.2d 960, 966 (Ill. 1998); *Byron*, 647 N.E.2d at 954; People v. Peeples, 616 N.E.2d 294, 322 (Ill. 1993); People v. Pasch, 604 N.E.2d 294, 315 (Ill. 1992); People v. Cisewski, 514 N.E.2d 970, 975-76 (Ill. 1987); People v. Smothers, 302 N.E.2d 324, 327 (Ill. 1973); People v. Tolliver, 807 N.E.2d 524, 543 (Ill. App. Ct. 1st 2004); People v. Abadia, 767 N.E.2d 341, 349 (Ill. App. Ct. 1st 2001).

89. *Smothers*, 302 N.E.2d at 327.

argument is within the trial court's discretion."[90] In *Blue*, the Illinois Supreme Court once again affirmed that "the trial court's determination of the propriety of the remarks [in closing argument] will not be disturbed absent a clear abuse of discretion."[91]

Seemingly unrelated, in *People v. Carlson*, the Illinois Supreme Court dealt with whether evidence seized pursuant to a search warrant not authorized by statute was admissible under the good-faith exception to the exclusionary rule.[92] In deciding this issue, the Court noted that "[w]here only a question of law is involved, . . . the circuit court's ruling is subject to *de novo* review."[93]

In *People v. Graham*, during closing argument, the prosecutor mentioned the defendant's post-arrest silence and mentioned that the defendant "was smart enough to ask for his lawyer."[94] The defendant failed to object to this error.[95] The Illinois Supreme Court reviewed this argument under the plain error doctrine.[96] Citing to *Carlson*, the Court held that "[w]e review this [legal] issue *de novo*."[97] It was logical to use *de novo* review in this context because (1) an appellate court cannot review the trial court for an abuse of discretion when the trial court did not have an opportunity to exercise that discretion and (2) mentioning defendant's invocation of his right to remain silent and his right to an attorney implicated a pure legal issue.[98] However, the Court did not explain the distinction between reviewing a pure legal issue versus reviewing the trial court's general determination that a defendant was not substantially prejudiced by the State's closing argument.[99]

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90. People v. Hudson, 626 N.E.2d 161, 178 (Ill. 1993).
91. *Blue*, 724 N.E.2d at 935 (quoting *Byron*, 647 N.E.2d at 954).
92. People v. Carlson, 708 N.E.2d 372, 373 (Ill. 1999).
93. *Id.* at 374.
94. People v. Graham, 795 N.E.2d 231, 237 (Ill. 2003).
95. *Id.* at 237.
96. *Id.*
97. *Id.* (citing *Carlson*, 708 N.E.2d at 374).
98. *See* People v. Rivera, 390 N.E.2d 1259, 1266 (Ill. App. Ct. 1st 1979) (defendant argued that the trial court was unaware of its discretion and, therefore, his case had to be remanded so the court could exercise its discretion. The appellate court concluded that the trial court was aware of its discretion.); *see Graham*, 795 N.E.2d at 237-38 (discussing that the U.S. Supreme Court held that the prosecution cannot use a defendant's post-*Miranda*-warning silence for impeachment purposes without violating due process, Doyle v. Ohio, 426 U.S. 610, 619 (1976)); *see also* People v. Burgund, 66 N.E.3d 553, 589 (Ill. App. Ct. 5th 2016) (stating that, although a trial court's evidentiary rulings are generally reviewed for an abuse of discretion, a ruling on whether a statement is hearsay is a *legal question* reviewed *de novo* when the determination does not involve a fact finding or credibility finding.).
99. *See Graham*, 795 N.E.2d at 237 (merely stating that the Court would "review this legal issue *de novo*.").

The *Graham* Court then applied the plain error doctrine to the defendant's unpreserved claim.[100] As stated earlier, this doctrine allows a defendant to argue an unpreserved error when (1) the evidence is close, regardless of the seriousness of the error or (2) the error is serious, regardless of the closeness of the evidence.[101] The Court concluded that the first prong of the doctrine did not apply because "the State presented strong evidence of the defendant's guilt[.]"[102] Likewise, the Court held that the second prong of the doctrine did not apply because "a comment upon a defendant's post-arrest silence, while improper, is not an error of such magnitude as to clearly deprive the defendant of a fair trial."[103] Accordingly, the Court rejected the defendant's argument.[104]

In *Wheeler*, the prosecutor made improper statements such as the jurors lived "sheltered lives" and that a different world existed "full of dangerous people" and "mean streets."[105] The defendant often objected, but the trial court overruled some objections.[106]

On appeal, defendant argued that the cumulative effect of these improper statements denied him a right to a fair trial.[107] The Illinois Supreme Court held that defendant preserved the issue for appeal.[108] Citing to *Graham*, the Court held that "[w]hether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*."[109] Nonetheless, the *Wheeler* Court did not explicitly overrule or distinguish *Blue*, which held that the style and substance of closing argument is a matter within the trial court's discretion and subject to an abuse of discretion standard.[110] Adding further complexity, the *Wheeler* Court cited approvingly to *Blue* for areas of law other than the standard of review.[111]

Based upon this history, it is apparent that *Wheeler* is an outlier from traditional Illinois jurisprudence. *Graham* used *de novo* review and the plain

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100. *Graham*, 795 N.E.2d at 238.

101. *Herron*, 830 N.E.2d at 479-80.

102. *Graham*, 795 N.E.2d at 238.

103. *Id.*

104. *See id.*

105. *Wheeler*, 871 N.E.2d at 748-49; *see generally* Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559 (2005).

106. *Wheeler*, 871 N.E.2d at 748-49.

107. *Id.* at 731.

108. *Id.* at 744-45 (noting that defendant properly preserved some of the improper closing arguments and that the court would then consider the entirety of the prosecutor's closing statement).

109. *Wheeler*, 871 N.E.2d at 744 (citing Graham, 795 N.E.2d at 235).

110. *See Wheeler*, 871 N.E.2d at 744.

111. *See id.* at 744, 749.

error doctrine for reviewing prosecutorial misconduct when the improper statements involved a pure legal issue.[112] However, *Graham* did not make an explicit distinction between reviewing a pure legal issue, which should be subject to *de novo* review, and reviewing the trial court's determination about the substance and style of closing argument, which was traditionally reviewed for an abuse of discretion.[113]

Wheeler, which cited to *Graham*, concluded that *de novo* review was appropriate when reviewing the propriety of the State's closing argument.[114] However, *Wheeler* was factually different from *Graham* because (1) the defendant in *Wheeler* objected to the statements at trial while the defendant in *Graham* did not object and (2) *Graham* dealt with a pure legal issue.[115]

The *Wheeler* Court also failed to overrule or distinguish *Blue*, which held that an abuse of discretion standard was the proper standard of review.[116] Causing further confusion, *Wheeler* cited *Blue* with approval for other areas of law.[117] Therefore, the Illinois Supreme Court undermined established precedent and caused confusion within the Illinois Appellate Court.[118]

C. AS A MATTER OF LAW, DE NOVO REVIEW APPLIES

Although *Wheeler* represents a deviation from traditional Illinois jurisprudence, it is still binding precedent.[119] Thus, *de novo* review applies when an appellate court reviews alleged prosecutorial misconduct during closing argument.[120] As such, the First and Third Divisions of the First District erred when they applied an abuse of discretion standard. Likewise, the Fourth and Sixth Divisions of the First District and the Second District should have applied *de novo* review rather than avoiding the issue merely because their conclusion in a particular case "would be the same under either standard."[121]

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112. *Graham*, 795 N.E.2d at 237 (citing *Carlson*, 708 N.E.2d at 372).

113. *See Graham*, 795 N.E.2d at 237 ("We review this legal issue *de novo*."); *see Burgund*, 66 N.E.3d at 589 (stating that, although a trial court's evidentiary rulings are generally reviewed for an abuse of discretion, a ruling on whether a statement is hearsay is a *legal question* reviewed *de novo*); *Blue*, 724 N.E.2d at 935 ("the trial court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion.").

114. *Wheeler*, 871 N.E.2d at 744.

115. *Compare Wheeler*, 871 N.E.2d at 745 ("we will focus our attention on the statements properly objected to.") *with Graham*, 795 N.E.2d 231 at 237-38 ("defendant forfeited review of this issue because he never objected to . . . the State's argument at trial and in a post-trial motion.").

116. *Wheeler*, 871 N.E.2d at 744 (citing *Graham*, 795 N.E.2d at 231).

117. *Wheeler*, 871 N.E.2d at 744, 749.

118. *See Green*, 2017 IL App (1st) 152513, ¶ 79.

119. *Palmer*, 889 N.E.2d at 251.

120. *Wheeler*, 871 N.E.2d at 744.

121. *Land*, 955 N.E.2d at 563; *Robinson*, 909 N.E.2d at 249-50.

D. AS A MATTER OF POLICY, WHAT STANDARD OF REVIEW SHOULD APPLY?

Although *de novo* review is the legal standard under current Illinois law, this article will now examine, as a matter of policy, which standard of review would be most desirable.[122] This subsection will discuss (1) *de novo* review, (2) abuse of discretion review, (3) manifest weight of the evidence review, and (4) review of mixed questions of law and fact. Similarly, this subsection will discuss the plain error doctrine. This subsection will also evaluate the standard of review for examining the propriety of closing statements under Illinois civil law and federal criminal law.

Ultimately, this subsection concludes that (1) abuse of discretion review should generally apply to the trial court's determination that a defendant was not substantially prejudiced by the State's closing argument; (2) *de novo* review should apply when the trial court's determination turned on a pure question of law; and (3) the plain error doctrine should apply when the defendant fails to preserve the issue of whether he was substantially prejudiced by the State's closing argument.

1. De Novo Review

De novo review is the least deferential towards the trial court.[123] When an appellate court reviews an issue *de novo*, it performs an independent analysis of the issue.[124] Generally, *de novo* review applies for questions of law or to the application of law to undisputed facts.[125]

De novo review of legal issues is appropriate because the appellate court is in a superior position to determine the law.[126] For example, trial judges devote most of their time to managing and determining the facts of a case and must regularly resolve legal issues without time for exhaustive legal research.[127] Conversely, appellate justices devote their primary attention to legal issues.[128] In addition, a trial judge usually decides a legal issue without

122. *See* Timothy P. O'Neill & Susan L. Brody, *Taking Standards of Appellate Review Seriously: A Proposal to Amend Rule 341*, 83 ILL. B. J. 512, 513 (1995).

123. *Ill. Pollution Control Bd.*, 892 N.E.2d at 610.

124. *Ortiz*, 975 N.E.2d at 183.

125. *Burgund*, 66 N.E.3d at 589.

126. *See* Kathleen L. Coles, *Mixed Up Questions of Fact and Law: Illinois Standards of Appellate Review in Civil Cases Following the 1997 Amendment to Supreme Court Rule 341*, 28 S. ILL. U. L. J. 13, 38 (2003).

127. Dan T. Coenen, *To Defer or Not To Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law,* 73 MINN. L. REV. 899, 922-28 (1989); Peter J. Kocoras, Comment, *The Proper Appellate Standard of Review for Probable Cause to Issue a Search Warrant*, 42 DEPAUL L. REV. 1413, 1418 (1993).

128. *See* Coles, *supra* note 126, at 40; *see also* United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1982).

consulting other judges or law clerks.[129] On the other hand, a panel on the Illinois Appellate Court is comprised of three justices and requires a majority vote to decide a legal issue.[130] Further, each appellate justice has several law clerks to perform additional legal research.[131]

2. *Abuse of Discretion Review*

Abuse of discretion is the most deferential standard of review.[132] Under an abuse of discretion standard, the reviewing court does not conduct an independent analysis of the issue and will only reverse the trial court's decision if (1) no reasonable person would take the view adopted by the trial court or (2) the trial court's ruling was arbitrary, fanciful, or otherwise unreasonable.[133]

Generally, abuse of discretion review applies to decisions by a trial judge in overseeing the courtroom or in maintaining the progress of a trial.[134] For example, the abuse of discretion standard applies to a trial court's relevancy determination, a trial court's evidentiary rulings, a trial court's ruling on a motion in *liminie*, a trial court's ruling on a motion for a new trial, a trial court's limitation on cross-examination, and other courtroom procedures.[135]

The abuse of discretion standard serves important policy goals. First, trial judges are entrusted to maintain court order, and appellate courts must be deferential to the trial court's methods.[136] Second, by applying the abuse of discretion standard, the appellate court saves judicial resources because it is relieved from conducting an exhaustive and independent review of the proceeding.[137] Finally, because the trial judge actually observed the proceeding, the trial court is in a better position to rule on these issues.[138]

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129. *See* Coles, *supra* note 126, at 38-44.

130. *See id.* at 39; *see also* Peter Nicolas, *De Novo Review In Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 532-35 (2004).

131. Kocoras, *supra* note 127, at 1418.

132. *Id.*

133. *Rivera*, 986 N.E.2d at 646; *see* Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROC. 47, 49-51 (2000); *see also* Mark P. Painter & Paula L. Welker, *Abuse of Discretion: What Should It Mean Under Ohio Law?*, 29 OHIO N.U. L. REV. 209, 219-22 (2002).

134. *Ill. Pollution Control Bd.,* 892 N.E.2d at 609.

135. STEIGMANN & NICHOLSON, *supra* note 83, § 20:21.

136. *See generally* People v. Boose, 362 N.E.2d 303, 304-07 (Ill. 1977).

137. Timothy P. O'Neill, *Standards of Review in Illinois Criminal Cases: The Need for Major Reform*, 17 S. ILL. U. L. J. 51, 55 (1992).

138. *Hudson*, 626 N.E.2d at 178; *see also* Alisa J. Baker, *Conduct of the Trial Judge*, 71 GEO. L. J. 627, 627-28 (1982).

3. *Manifest Weight of the Evidence Review*

The manifest weight of the evidence standard applies to factual findings made by the trial court.[139] A factual finding is against the manifest weight of the evidence only if (1) the opposite conclusion is clearly evident or (2) the finding itself is unreasonable, arbitrary, or not based on the evidence.[140] When the evidence is merely conflicting, a reviewing court will not substitute its judgment for that of the trial court.[141]

Manifest weight of the evidence is appropriate because the trial court, rather than a reviewing court, is in a better position to determine the facts of a case.[142] The trial court is in a better position to determine the facts of a case because it had the opportunity to observe the witnesses first hand, listen to their testimony, judge their credibility, and observe their nonverbal communications. Nonverbal communication is especially important in determining the credibility of a witness.[143] Furthermore, as aptly described by Justice Robert J. Steigmann, the record on appeal cannot adequately convey the "paralanguage" that the trial court hears:

> Spoken language contains more communicative information than the mere words because spoken language contains "paralanguage"—that is, the "vocal signs perceptible to the human ear that are not actual words." [citation omitted]. Paralanguage includes "quality of voice . . . , variations in pitch, intonation, stress, emphasis, breathiness, volume, extent . . . , hesitations or silent pauses, filled pauses or speech fillers . . . , the rate of speech, and extra-speech sounds such as hissing, shushing, whistling, and [other] sounds." [citation omitted]. The information expressed through paralanguage is

139. Shulte v. Flowers, 983 N.E.2d 1124, 1128 (Ill. App. Ct. 4th 2013).

140. People v. Holman, 937 N.E.2d 196, 199 (Ill. App. Ct. 2d 2010); *see* Richard H. W. Maloy, *'Standards of Review'-Just A Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 639 (2000).

141. People v. Downin, 828 N.E.2d 341, 349 (Ill. App. Ct. 3d 2005); *see* Brad A. Elward, *Workers' Compensation Reviews and Appeals: A Review and Suggestion for Change*, 22 N. ILL. U. L. REV. 493, 506 (2002).

142. Burnett v. Safeco Ins. Co. of Ill., 590 N.E.2d 1032, 1039 (Ill. App. Ct. 5th 1992).

143. Jaclyn M. D'Esposito, Note, *The Role of Nonverbal Persuasion in Juror Decision-Making and the Need to Regulate the Trial Consulting Industry*, 30 NOTRE DAME J. L. ETHICS & PUB. POL'Y 143, 172-73 (2016); Hon. James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 942-43 (2000); Lance Stockwell & David C. Schrader, *Factors That Persuade Jurors*, 27 U. TOL. L. REV. 99, 99-103 (1996); Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1204 (1993); Captain Jeffrey D. Smith, *The Advocate's Use of Social Science Research into Nonverbal and Verbal Communication: Zealous Advocacy or Unethical Conduct?*, 134 MIL. L. REV. 173, 193 (1991).

> rarely included in the transcript, as there is generally no written counterpart for these features of speech.[144]

4. Review of Mixed Question of Law and Fact

Courts apply a bifurcated standard of review when reviewing mixed questions of law and fact.[145] The appellate court will not reverse the trial court's factual findings unless those findings are against the manifest weight of the evidence.[146] A finding is against the manifest weight of the evidence only if the opposite conclusion is apparent or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented.[147] Nonetheless, the trial court's ultimate ruling based on those facts is reviewed *de novo*.[148]

The Illinois Supreme Court has described this standard of review as "lying between the manifest weight of the evidence standard and a *de novo* standard, so as to provide 'some deference' to the [trial court]'s decision."[149] Appellate courts apply this deferential standard because the trial court is in a better position to determine and weigh the evidence presented at trial.[150]

5. The Civil and Federal Standard

In civil cases in the state of Illinois, improper comments during closing argument require reversal only when the comments are so prejudicial as to deprive the other party of the right to a fair trial.[151] Issues concerning the prejudicial effect of these comments are within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion.[152]

The United States Court of Appeals for the Seventh Circuit, whose district includes the state of Illinois, first considers whether a prosecutor's statements were improper.[153] If improper, the court then considers whether the statements, considering their context and the entire record, deprived the

144. People v. Hadden, 44 N.E.3d 681, 685-86 (Ill. App. Ct. 4th 2015) (citing Keith A. Gorgos, *Lost in Transcription: Why the Video Record is Actually Verbatim*, 57 BUFF. L. REV. 1057, 1107 (2009)).

145. *Rivera*, 879 N.E.2d at 882; *see also* Randal H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 102 (2005).

146. *Rivera*, 879 N.E.2d at 882.

147. People v. Mott, 906 N.E.2d 159, 163-64 (Ill. App. Ct. 4th 2009).

148. *Id.* at 162-63.

149. AFM Messenger Serv., Inc. v. Dep't of Emp't Sec., 763 N.E.2d 272, 280 (Ill. 2001); *see also Mixed Questions of Law and Fact*, 110 HARV. L. REV. 317, 317-18 (1996).

150. See People v. Pitman, 813 N.E.2d 93, 100 (Ill. 2004); *see also* Edward J. Walters, Jr. & Darrel J. Papillion, *Appellate Review of Mixed Questions of Law and Fact: Due Deference to the Fact Finder*, 60 LA. L. REV. 541, 541-42 (2000).

151. Zickuhr v. Ericsson, Inc., 962 N.E.2d 974, 990 (Ill. App. Ct. 1st 2011).

152. *Id.*

153. United States v. Sandoval, 347 F.3d 627, 631 (7th Cir. 2003).

defendant of a fair trial.[154] When a defendant objects to a prosecutor's comments during closing argument, the trial court's ruling will be reversed only for an abuse of discretion.[155]

6. The Plain Error Doctrine

To properly preserve a claim for review, a defendant must object to a perceived error during trial and in a post-trial motion.[156] If a defendant fails to properly preserve a claim, the purported error is forfeited for appellate review.[157]

The plain error doctrine is an exception to the forfeiture rule.[158] Under this doctrine, an appellate court may exercise its discretion and review a forfeited issue when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error or (2) when a clear or obvious error occurred and that error is so serious that it affected the fundamental fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.[159]

The initial step under the plain error doctrine is to determine whether the defendant proved that a plain error even occurred.[160] Alternatively, if the defendant is arguing that the evidence was closely balanced, the court could begin by analyzing whether the defendant proved that the evidence was closely balanced.[161] If the court determines that the evidence is not closely balanced, it need not determine whether an error occurred.

Plain is synonymous with a "clear" or "obvious" error.[162] If the reviewing court determines that no clear or obvious error occurred, the issue is forfeited and the court will honor the procedural default.[163] If the reviewing court determines that a clear or obvious error occurred, it proceeds to the second step of the analysis: which is to determine whether the plain error requires reversal.[164]

When the defendant claims first-prong error, a reviewing court must decide whether the defendant has shown that the evidence was so closely balanced that the plain error alone *severely threatened* to tip the scales of justice

154. *Id.*
155. *Id.*
156. *Love*, 878 N.E.2d at 795.
157. *Sebby*, 89 N.E.3d at 687.
158. *Herron*, 830 N.E.2d at 479.
159. *Sebby*, 89 N.E.3d at 687.
160. People v. Tademy, 30 N.E.3d 1134, 1138 (Ill. App. Ct. 3d 2015).
161. People v. Belknap, 23 N.E.3d 325, 340 (Ill. 2014).
162. *Tademy*, 30 N.E.3d at 1138.
163. People v. Bowens, 943 N.E.2d 1249, 1262 (Ill. App. Ct. 4th 2011).
164. *Id.*

against him.[165] In determining if the evidence was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case.[166] If defendant meets this burden, he has demonstrated actual prejudice and his conviction should be reversed.[167]

When the defendant claims second-prong error, he must prove that a structural error occurred.[168] A structural error is an error which renders a criminal trial fundamentally unfair or unreliable in determining a defendant's guilt or innocence.[169] Structural errors occur in very limited circumstances such as a complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the selection of a grand jury, and a defective reasonable doubt instruction.[170]

The defendant bears the burden of persuasion at all times.[171] If the defendant fails to meet his burden under the plain error doctrine, the issue is forfeited and the reviewing court will honor the procedural default.[172]

The policy behind the forfeiture rule is to limit the scope of an appeal to the issues that were considered significant by the parties at trial and to ensure that the trial court had an opportunity to correct those errors during trial.[173] Likewise, the forfeiture doctrine ensures that a defendant does not obtain a reversal through inaction at the trial court level.[174] The forfeiture rule also lessens the burden on the appellate court.[175]

The policy behind the plain error doctrine is to ensure that the rights of a defendant are protected and to insure the integrity of the judicial process.[176]

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165. *Sebby*, 89 N.E.3d at 688.

166. *Id.*

167. *Id.*

168. People v. Garcia, 942 N.E.2d 700, 710 (Ill. App. Ct. 1st 2011).

169. *Bowens*, 943 N.E.2d at 1258-59.

170. People v. Averett, 927 N.E.2d 1191, 1198 (Ill. 2010).

171. *Herron*, 830 N.E.2d at 473.

172. People v. Ahlers, 931 N.E.2d 1249, 1255 (Ill. App. Ct. 4th 2010).

173. Steven W. Becker, *To Review or Not to Review: The Plain Truth About Illinois' Plain Error Rule*, 37 LOY. U. CHI. L.J. 455, 458-59 (2006); Larry Cunningham, *Appellate Review of Unpreserved Questions in Criminal Cases: An Attempt to Define the "Interest of Justice,"* 11 J. APP. PRAC. & PROCESS 285, 285-86 (2010).

174. People v. Denson, 21 N.E.3d 398, 401 (Ill. 2014); Robert J. Martineau, *Considering New Issues On Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1029-30 (1987).

175. Edward Goolsby, Comment, *Why So Serious? Taking the Word "Seriously" More Seriously in Plain Error Review of Federal Sentencing Appeals*, 51 HOUS. L. REV. 1449, 1454-56 (2014); s*ee* Robert W. Cook, *An Appellate Justice's Quick Guide to Appeals*, 97 ILL. B.J. 132, 133-35 (2009).

176. Becker, *supra* note 173, at 458-59 (quoting *Herron*, 830 N.E.2d at 474); *see* Jon M. Woodruff, Note, *Plain Error By Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?*, 102 IOWA L. REV. 1811, 1813-19 (2017); *see* Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled*

Although the plain error doctrine is not based on constitutional law, it "has roots in the same soil as due process."[177]

E. POLICY CONCLUSIONS

As a matter of policy, this subsection concludes that (1) abuse of discretion review should normally apply to the trial court's determination that a defendant was not substantially prejudiced by the State's closing argument; (2) *de novo* review should apply when the trial court's determination turned on a pure question of law; and (3) the plain error doctrine should apply when the defendant fails to preserve the issue of whether he was substantially prejudiced by the State's closing argument.

1. Normally, Abuse of Discretion Review Should Apply

Normally, abuse of discretion is the optimal standard of review for evaluating whether the trial court erred when determining that a defendant was not substantially prejudiced by the State's closing argument. First, the abuse of discretion standard is normally applied to a trial court's management of the courtroom, which would traditionally include closing statements.[178] Second, the trial judge is in a better position to determine the prejudicial effect, if any, from allegedly improper closing statements because the reviewing court can only examine the cold record while the trial judge had the opportunity to observe closing arguments firsthand and observe how the jury reacted.[179] Moreover, the nonverbal communication of how the jury reacted to the State's closing argument, which cannot be reproduced on appeal, is of utmost importance in determining if prejudice resulted from an allegedly improper closing argument.[180] Third, in this context, adopting abuse of discretion review for prosecutorial misconduct in closing statements would bring Illinois criminal law in harmony with Illinois civil law and federal criminal law. Finally, adopting an abuse of discretion standard would save judicial resources because the reviewing court would be relieved of conducting an exhaustive factual review.[181] Hence, abuse of discretion is usually the best standard.

Decision-Making, 17 SUFFOLK J. TRIAL & APP. ADVOC. 179, 192-93 (2012); *see* Robert J. Labrum, Comment, *History and Application of the Plain Error Doctrine in Utah*, 2000 UTAH L. REV. 537, 551 (2000).

177. Becker, *supra* note 173 at 458-59; *see also* Morton Gitelman, *The Plain Error Rule In Arkansas—Plainly Time for a Change*, 53 ARK. L. REV. 205, 206-07 (2000).

178. *See Hudson*, 626 N.E.2d at 178.

179. People v. Patterson, 25 N.E.3d 526, 538 (Ill. 2014); *see also Hadden*, 44 N.E.3d at 684-85.

180. *See* Keith A. Gorgos, *Lost in Transcription: Why the Video Record is Actually Verbatim*, 57 BUFF. L. REV. 1057, 1107 (2009).

181. *See* Coles, *supra* note 126, at 40.

At first glance, reviewing the propriety of closing arguments as a mixed question of law and fact seems appropriate. This standard would be practical because the appellate court would largely defer to the trial court's factual findings but would conduct an independent review of the trial court's legal conclusion.[182] However, although Illinois courts have applied this standard in other contexts, it has never been applied to reviewing the propriety of closing arguments. Accordingly, as a matter of *stare decisis*, this standard of review is not appropriate. Further, adopting this standard would not align Illinois criminal law with Illinois civil law and federal criminal law.

However, as a matter of policy, *de novo* review is generally not appropriate for reviewing the trial court's determination of the propriety of closing arguments. *De novo* review is traditionally reserved for reviewing legal conclusions, and reviewing the propriety of closing arguments is usually fact intensive.[183] Moreover, the trial court, rather than the appellate court, is in a better position to make the determination of whether closing arguments substantially prejudiced a defendant.[184] Thus, *de novo* review is not deferential enough to the trial court's determination.

Finally, manifest weight of the evidence is not appropriate for reviewing the trial court's determination that a defendant was not substantially prejudiced by the State's closing argument. Although closing arguments are fact intensive, determining whether a defendant was substantially prejudiced by the State's closing argument is not a pure factual determination.[185]

2. De Novo Should Apply for a Pure Question of Law

De novo review should apply when (1) the defendant properly preserved the issue of whether he was substantially prejudiced by the State's closing argument and (2) the trial court's determination of whether he was substantially prejudiced turned on a pure question of law.

De novo is appropriate in this circumstance because the appellate court is in a better position than the trial court to determine the law.[186] Furthermore, a reviewing court can efficiently review the record to determine if the trial court made a legal error. Moreover, even for areas of law that are normally subject to an abuse of discretion review, *de novo* review is applied when the determination is a pure matter of law. For example, a trial court's evidentiary rulings are normally reviewed for an abuse of discretion; but a ruling on whether a statement is hearsay is reviewed *de novo* when the determination

182. *Rivera*, 879 N.E.2d at 882.
183. *Smothers*, 302 N.E.2d at 326.
184. *Id.*
185. *See Wheeler*, 871 N.E.2d at 744.
186. *See* Coles, *supra* note 126, at 38.

does not involve fact or credibility finding.[187] Likewise, evidentiary rulings involving questions of statutory interpretation are reviewed *de novo*.[188] Accordingly, if a trial court's determination that a defendant was not prejudiced by the State's closing argument turned on a matter of law, *de novo* review is appropriate.

3. The Plain Error Doctrine Should Apply When Defendant Fails to Preserve the Issue

Finally, when a defendant fails to properly preserve the issue of whether he was substantially prejudiced by the State's closing argument, appellate courts should evaluate this issue under the plain error doctrine. Under this doctrine, the court should determine whether *the defendant* met his burden of showing that a clear or obvious error occurred and that (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against him or (2) the error was so serious that it affected the fundamental fairness of his trial. It is important to note that the plain error doctrine is not a standard of review in a typical sense. However, by emphasizing that the burden is on the defendant, courts can affirm a conviction because the defendant failed to meet his burden. This is a different analytical framework than affirming a conviction because the trial court did not err or because the trial court did not abuse its discretion. Thus, the plain error doctrine serves as a *de facto* standard of review.[189]

Under this doctrine, the reviewing court could affirm a conviction under a variety of ways. First, the court could determine that the defendant failed to prove that a clear or obvious error occurred. This is because courts allow prosecutors wide latitude when delivering closing argument and trial judges often cure any potential prejudice by sustaining objections and instructing the jury on the law. Likewise, if a defendant objected to the statements at trial but neglected to file a post-trial motion, a reviewing court could easily determine that the defendant failed to prove that the trial court's denial of his objection was an abuse of discretion. Alternatively, when the trial court's ruling or the prosecutor's statements involved a pure question of law, the defendant could often prove that a clear or obvious error occurred.

Second, when defendant is arguing first prong error, the court could simply determine that the evidence was not closely balanced. If the evidence

187. People v. Steele, 19 N.E.3d 1084, 1095 (Ill. App. Ct. 1st 2014).

188. People v. Learn, 919 N.E.2d 1042, 1048 (Ill. App. Ct. 2d 2009).

189. *Compare Herron*, 830 N.E.2d at 475 n.1 ("The plain-error test, in both its federal and state formulas, is more aptly described as a standard to help a reviewing court determine when to excuse forfeiture.") *with* People v. Bean, 560 N.E.2d 258, 264 (Ill. 1990) ("Our standard of review on this issue is that of the plain error doctrine, for defendant did not raise this issue either through a trial objection or in his post-trial motion.").

is not closely balanced, the court need not determine whether an error occurred.

Finally, if a defendant argues that the State's closing statements was second prong error, the court could summarily reject that argument except in extreme cases.[190]

Nonetheless, when a slight error does occur, the first prong of the plain error doctrine would be sufficient to ensure that the rights of the defendant are protected. Likewise, in the event of an egregious breakdown of the adversarial system, the second prong of the plain error doctrine could theoretically apply.

IV. CONCLUSION

As the law currently stands, the Illinois Appellate Court must apply *de novo* review when evaluating whether the State's closing argument substantially prejudiced a defendant. *Wheeler*, despite its faults, is binding precedent in the state of Illinois.

V. RECOMMENDATION

The Illinois Supreme Court must resolve this division within the Illinois Appellate Court. This matter is of unique importance to criminal defendants and the Illinois Appellate Court has shown little interest in decisively settling this issue.[191] When resolving this division, the Illinois Supreme Court should conclude that (1) abuse of discretion review should normally apply to the trial court's determination that a defendant was not substantially prejudiced by the State's closing argument; (2) *de novo* review should apply when the trial court's determination turned on a pure question of law; and (3) the plain error doctrine should apply when the defendant fails to preserve the issue of whether he was substantially prejudiced by the State's closing argument. Adopting this three-pronged approach would clarify Illinois law and serve important policy goals.

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190. *See* People v. Adams, 962 N.E.2d 410, 416 (Ill. 2012) (noting that the prosecutor's improper speculation during closing argument was not so serious that it affected the fundamental fairness of the defendant's trial or challenged the integrity of the judicial process); People v. Shaw, 52 N.E.3d 728, 741-45 (Ill. App. Ct. 4th 2016) (prosecutor's statement that defendant would not have resisted the police if he only had cannabis were not so serious that they affected the fundamental fairness of defendant's trial or challenged the integrity of the judicial process).

191. *See, e.g.*, People v. Austin, 79 N.E.3d 312, 323 (Ill. App. Ct. 1st 2017); People v. Sandifer, 65 N.E.3d 969, 983 (Ill. App. Ct. 1st 2016); *Burman*, 986 N.E.2d at 1254; *Land*, 955 N.E.2d at 563; *Robinson*, 909 N.E.2d at 249-50.